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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 229

LAR DALY, *Petitioner*

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 286 F. 2d 146. The two rulings of the Federal Communications Commission (Pet. App. 9a-12a) have not been officially reported, but its ruling denying reconsideration of the original ruling is reported unofficially at 19 Pike & Fischer, Radio Regulation[1] 1103.

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[1] Hereinafter referred to as "Radio Reg."

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1961 (Pet. App. 6a). Rehearing was denied on February 13, 1961 (Pet. App. 7a). By orders of Mr. Justice Clark, dated May 12 and June 12, 1961, the time for filing a petition for certiorari was extended to July 13, 1961. The petition for a writ of certiorari was filed on July 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the court of appeals properly affirmed orders of the Federal Communications Commission holding that its requirement that broadcasting stations provide a fair and balanced presentation of important public issues did not entitle petitioner to be among those chosen by the Columbia Broadcasting System to respond to an editorial statement with respect to a possible amendment of the Communications Act.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a) (Supp. II), reads as follows:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its sta-

tion by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

On February 19, 1959, the Federal Communications Commission ruled that Section 315 (a) of the Communications Act, as it then read,[2] entitled petitioner Lar Daly, a primary candidate for the office of Mayor

[2] Public Law 86-274, 73 Stat. 557, effective September 14, 1959, added the last two sentences in Section 315 (a), *supra*, which exempt newscasts, news interviews, news documentaries, and on-the-spot coverage of news events from the licensee's obligation to afford equal opportunities in the use of his station to legally qualified candidates for public office. Prior to the amendment, Section 315 (a) consisted only of the first two sentences set forth above.

of Chicago, to "equal opportunities" in the use of certain Chicago television broadcast stations, because of the appearance of opposing candidates in film clips shown on regularly scheduled newscasts on those stations. *CBS, Inc.*, 18 Radio Reg. 238. On June 17, 1959, the Commission issued an "Interpretive Opinion" denying petitions for reconsideration of its February 19th ruling and explaining the basis for its construction of Section 315 (a). *CBS, Inc.*, 26 F.C.C. 715, 18 Radio Reg. 701.

Shortly after the Commission's first ruling, a number of bills were introduced in Congress to amend Section 315 (a) to exempt various kinds of news programs from the "equal opportunities" requirement. Hearings on these bills were held in late June and early July of 1959.[3] On July 22, 1959, the Senate Committee on Interstate and Foreign Commerce reported favorably a bill which proposed to exempt from the "equal opportunities" requirement appearances by candidates on newscasts, news interviews, news documentaries, on-the-spot coverage of news events and panel discussions. S. Rep. No. 562, 86th Cong., 1st Sess. This bill was debated, amended and passed by the Senate on July 28, 1959. 105 Cong. Rec. 14438-14463.

On July 26, 1959, the Columbia Broadcasting System Television Network (CBS) presented a program entitled "Behind the News with Howard K. Smith," which was devoted to Section 315, the Commission's

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[3] Hearings on S. 1585, 1604, 1858 and 1929 before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959); Hearings on H.R. 5389, 5675, 6326, 7122, 7180, 7206, 7602 and 7985 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. (1959).

recent rulings on newscasts, and the pending legislative proposals (R. 23-28;[4] see Pet. App. 4a, 9a, 11a). The program included an editorial statement by Dr. Frank Stanton, President of CBS, who urged enactment of the legislation recommended by the Senate committee (R. 37, 38; see Pet. App. 4a). At the close of the program, the announcer stated (R. 38; see Pet. App. 4a): "The CBS Television Network will provide time next week for the presentation of opposing viewpoints to that taken in the CBS editorial broadcast by Dr. Frank Stanton today."

In preparation for this program, CBS had, on its own initiative, arranged for the subsequent appearance of Dr. Daniel M. Berman, Assistant Professor of Political Science, Washington College, Chestertown, Maryland, and Mr. Erich Hass of the Socialist Labor Party to present views in opposition to those expressed by Dr. Stanton (R. 17-18; see Pet. App. 4a, 11a-12a). Following the program of July 26, 1959, CBS received requests for an opportunity to appear in opposition to Dr. Stanton's statement from petitioner Lar Daly and from six other persons or organizations (R. 18; see Pet. App. 4a). From this group CBS selected Dr. Timothy Costello, Assistant State Secretary of the Liberal Party of the State of New York, as a third representative of an opposing viewpoint.[5]

On August 2, 1959, after the Senate had passed a bill, but before any action by the House, CBS pre-

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[4] "R." refers to the record filed in the court of appeals.

[5] CBS stated that it did not permit all who expressed a desire to reply to Dr. Stanton to appear because, in its view, "a meaningful and informative program would have been impractical, if not impossible, were all requesters to appear and express their viewpoints on the second program" (R. 18).

sented its second program on Section 315. Dr. Berman took a position entirely contrary to that of Dr. Stanton and defended *in toto* the then existing law, as it had been interpreted by the Commission (R. 53, 54; see Pet. App. 4a, 12a). The other two participants agreed with Dr. Stanton that newscasts should be exempted from Section 315's requirement of "equal opportunities", but in the main[6] opposed the exemption of other news programs provided for in the pending legislation (R. 46, 50; see Pet. App. 4a, 12a).

Meanwhile, on July 30, 1959, petitioner Daly had filed with the Commission a "Petition for Interpretive Ruling Forthwith" (R. 2-4) and, on August 5, 1959, a supplementary petition, alleging that he was uniquely qualified to present the opposition position and requesting that the Commission direct CBS to provide him equal time to oppose Dr. Stanton's views at a date later in August (R. 8-12; Pet. App. 5a). In support of his requests, petitioner cited the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), 1 Radio Reg. (Part 3) 91:201 (set forth in pertinent part in the Appendix, *infra*, pp. 11-16), which declares that broadcast licensees have an obligation under the public interest standard of the Communications Act to "devote a reasonable percentage of their broadcasting time to the discussion of public issues * * *" in such a manner that "the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community." 13 F.C.C. at 1257-1258, par.

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[6] Dr. Costello also favored exemption of on-the-spot coverage of news events (R. 50; see Pet. App. 4a).

21, 1 Radio Reg. (Part 3) at 91:211, par. 21 (App., *infra*, p. 16).[7] On August 16, 1959, in reply to pleadings filed by CBS, petitioner urged that the CBS program of August 2d had not fairly presented the opposition side and that a further reply to Dr. Stanton by Mr. Daly was required (R. 61; see Pet. App. 4a, 12a).

By letter dated August 18, 1959, the Commission advised petitioner of its conclusions that CBS had fulfilled its obligation to provide "a fair and balanced presentation of an important public issue of a controversial nature" within the meaning of the *Report on Editorializing* and that no action on the part of the Commission was warranted (Pet. App. 9a-10a). In rejecting petitioner's contention that a fair presentation could not be achieved without including him as the allegedly "most qualified spokesman," the Commission stated that the controversial issue was "the newscast question, and not Lar Daly" and that the participants in the August 2d program of CBS appeared "qualified to oppose the views expressed by Mr. Stanton" (Pet. App. 10a). On March 24, 1960, after Section 315(a) had been amended, the Commission by letter denied petitioner's request for reconsideration (Pet. App. 11a-12a).

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[7] The *Report on Editorializing* further states that although "no one all embracing formula" can be applied in selecting spokesmen for the various viewpoints to be expressed on a controversial question, a licensee in some circumstances may be required to consider the "personal involvement" of persons in the controversy, since "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F.C.C. at 1251-1252, par. 10, 1 Radio Reg. (Part 3) at 91:206, par 10 (App., *infra*, pp. [redacted]).

On petition for review, the court of appeals denied (Pet. App. 1a-5a) petitioner's request for a judicial determination that the Commission's rulings of August 18, 1959, and March 24, 1960, were "unlawful, erroneous and invalid and should be enjoined, set aside, annulled, and suspended" (Pet. App. 1a). Noting (Pet. App. 4a) that it did "not appear from the record that any personal attack was made on the petitioner," the court stated that it had "considered with care all the arguments advanced by petitioner" and found them "without merit" (Pet. App. 5a). With respect to the Commission's conclusion that CBS had fulfilled its obligation to provide a fair and balanced presentation of conflicting views on a controversial issue of public importance, the court stated (Pet. App. 5a): "Our study of this case shows no basis for holding the Commission's instant interpretation of its rules on editorializing to be plainly erroneous or inconsistent."

ARGUMENT

The petition presents no important question of law warranting disposition by this Court. On the contrary, the question presented turns on the particular facts and lacks general importance.

Petitioner's contention (Pet. 15-18) that the Commission and the court below misapplied the standard set forth in the Commission's *Report on Editorializing by Broadcast Licensees* rests on petitioner's belief that the first CBS program involved principally the newscast question and that petitioner, because of the Commission's previous ruling in his favor under Section 315 (a) (*CBS, Inc., supra*), was a required participant. But the CBS program went beyond the narrow question of newscasts and concerned all of the various pro-

posed changes in Section 315 (a). Furthermore, the controversial issue worthy of public discussion was the proposed change in the law and its effect nationwide, rather than a personal dispute between CBS and petitioner. It was not necessary to a "fair and balanced" discussion of the issues to include petitioner among the qualified persons selected to present varying viewpoints, merely because the so-called "Lar Daly case" (*CBS, Inc., supra*) had precipitated the controversy.

In any event, petitioner presents no question requiring resolution by this Court. As petitioner has conceded (Pet. 2-3), the court below accorded the proper weight to agency's interpretation of its own policy pronouncements. The correctness of the application of that policy to the particular facts of this case has been reviewed by the court below and raises no issue for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1961.

APPENDIX

The pertinent provisions of the Commission's *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), 1 Radio Reg. (Part 3) 91:201, are as follows:

* * * * * *

6. It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radio-broadcasting. Unquestionably, then, the standard of pubic interest, convenience and necessity as applied to radio-broadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[2] It is this right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broad-

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[2] Cf. *Thornhill* v. *Alabama*, 310 U.S. 88, 95, 102; *Associated Press* v. *United States*, 326 U.S. 1, 20.

cast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

7. This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The *United Broadcasting Company* (WHKC) case, 10 FCC 675, emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof. The *Scott* case, 3 Pike & Fischer RR 259, stated our conclusions that this duty extends to all subjects of substantial importance to the community coming within the scope of free discussion under the First Amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf. *National Broadcasting Company* v. *United States*, 319 U.S. 190; *Allen T. Simmons*, 3 Pike & Fischer RR 1029, affirmed, *Simmons* v. *Federal Communications Commission*, 169 F. (2d) 670, certiorari denied, 335 U.S. 846; *Bay State Beacon*, 3 Pike & Fischer RR 1455, affirmed, *Bay State Beacon* v. *Federal Communications Commission*, U.S. App. D.C., decided December 20, 1948; *Petition of Sam Morris*, 3 Pike & Fischer RR 154; *Thomas N. Beach*, 3 Pike & Fischer RR 1784. And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fair-

ness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.*, 8 F.C.C. 333; *United Broadcasting Co.* (WHKC) 10 F.C.C. 515; cf. *WBNX Broadcasting Co., Inc.* 4 Pike & Fischer RR 244 (Memorandum Opinion). Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

8. It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programming techniques would seriously limit the ability of licensees to serve the public interest. Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in

some circumstances may not be particularly appropriate or advantageous. Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness, in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

9. We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a

demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourge and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

10. It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of

view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

* * * * * *

21. To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. * * *

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